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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 484

MICHAEL CARBONE and LOUIS MACCHIARELLI,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
401 Broadway
New York, N. Y. 10013

ROBERT KASANOF
52 Broadway
New York, N. Y. 10004

Attorneys for Petitioners Carbone and Macchiarelli

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

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Petitioners, Michael Carbone and Louis Macchiarelli, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on May 29, 1967.

Citations to Opinions Below

The opinion of the Court of Appeals has not yet been officially reported and is printed as Appendix A to this Petition. The judgment of the Court of Appeals is printed as Appendix B hereto.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 29, 1967. Rehearing was denied on June 15, 1967, and by an order dated the 6th of July, Mr. Justice

Harlan extended the time of petitioners in which to file a writ of certiorari to and including August 14, 1967. The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254(1).

Questions Presented

(1) Does not the holding of *Dunn* v. *United States*, 284 U.S. 390 (1932) not only permit but require the reversal of a jury verdict where the findings on separate counts are so inconsistent that if they were counts in separate indictments, successively tried, the verdict of acquittal would be a bar to a second trial?

(2) If *Dunn* v. *United States*, 284 U.S. 390 (1932), is understood to mean that courts of appeal are without power to upset inconsistent jury verdicts, should it not be overruled as incompatible with enlightened jurisprudence?

Statutes Involved

Title 21, United States Code, Section 173 provides:

> § 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*—It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for

the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Title 21, United States Code, Section 174 provides:

§ 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such

acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever, on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Statement

Petitioners Carbone and Macchiarelli were convicted after trial in the Southern District before Judge Cooper and a jury of conspiring to violate the narcotics laws (§§ 173 and 174 of Title 21, U.S.C.). They were acquitted of the substantive count laid against them in the indictment.

Despite the fact that the trial lasted less than four full days, the case was obviously a troublesome one for the jury, which commenced to deliberate at 5:00 in the afternoon and did not return a verdict until 3:40 in the afternoon of the following day (515; 523).* In order to understand the special significance of their dichotomous and contradictory verdict it is necessary to sketch briefly the shape of the proof. On July 6th Agent Peterson of the Bureau of Narcotics, working undercover, was introduced to the

* Numbers in parentheses refer to the stenographic transcript of the trial or, if preceded by the letter "A.", to the Appellant's Appendix filed in this case in the Court of Appeals.

co-defendant Lowe, a petty police character, who testified at the trial for the Government. Peterson, representing himself as Bob from Baltimore, sought to buy narcotics and to obtain a sample for the purpose of ascertaining its quality. Lowe, who went under the name of "Cadillac Willie" or "C.W.", according to his testimony contacted Carbone and Macchiarelli who then appeared in the vicinity where Agent Peterson and he were waiting. After an elaborate charade with automobiles during which one of the appellants leaned into Cadillac Willie's empty parked vehicle, Cadallac Willie went to his car and returned from it to give Agent Peterson a small "sample" packet. Shortly after midnight, when Agent Peterson had confirmed for himself that the package contained heroin, he phoned Cadillac Willie and set up a meeting for the late afternoon of the 7th, which ultimately took place at around nine o'clock. Carbone and Macchiarelli again appeared in the vicinity. Agent Peterson indicated this time that he was short of money and that the delivery would have to be postponed until about midnight when the rest of his funds would arrive. After leaving, he returned to the bar at about midnight, at which time he displayed the full purchase price to Cadillac Willie who then went to a nearby automobile where Carbone and Macchiarelli were once again seated. He returned to Agent Peterson and told him delivery would be made shortly. Agent Peterson waited vainly until 4:15 in the morning; no delivery was ever made.

Carbone and Macchiarelli each testified in their own behalf and each denied any dealing with or trafficking in narcotics. While this Court cannot rehear jury issues, their backgrounds are so strikingly dissimilar from those

usually found in cases of this sort that it cannot go unremarked. Carbone was thirty-nine years of age at the time of the trial and had worked as a refrigeration mechanic for the Norge Company for twenty-two years and is married and an honorably discharged veteran of World War II. Macchiarelli, who was forty-one years of age at the time of the trial, is married, with three children, with a steady work record as a truck driver and garage mechanic.

Except for the testimony of Cadillac Willie Lowe, the proof of possession of narcotics on the part of the defendants was all ambiguously circumstantial, and when the jury by its acquittal rejected his testimony and perforce the possession by the defendants of the "sample" narcotics, they set up a very special kind of inconsistency amounting to a failure of proof with their verdict of guilty on the conspiracy count. As to the conspiracy count, the Government was required to show that the object of the conspiracy was to deal in narcotics which were imported contrary to law and which the defendants knew to have been so imported. Of course if the Government could show the defendants in possession of the narcotics, it was relieved of having to make any express showing in regard to importation by the provisions of the presumption contained in § 174 of Title 21. But the jury's verdict of acquittal on the substantive count, the heart of which was the only actual or constructive possession laid to the defendants, amounted to a special verdict which deprived the Government of the benefits of the presumption and necessarily left a fatal gap in the Government's proof, as the Government in this case made no effort to trace the importation of the narcotics involved here.

When Judge Cooper came to charge the jury as to the substantive count of the indictment, he made it very plain to them that they might find the defendants guilty if they concealed, sold, or facilitated the sale of a narcotic drug, by charging the jury:

> "First, that on or about the date set forth in the indictment, July 6, 1964, Carbone and Macchiarelli either—I said either—received, or concealed, or sold, or in any manner facilitated the transportation, concealment, or sale of any narcotic. You notice I put the emphasis on 'or.' It does not have to be all of them, but it can be any one of them comes within the prohibition of the statute.
>
> Now, what is the second element that must be established beyond a reasonable doubt? That the substance contained in the government's exhibits in evidence is a narcotic drug.
>
> And third, that that narcotic drug was illegally imported into the United States.
>
> And fourth, that the defendants knew that this narcotic drug had been illegally imported into the United States." (473; A. 17)

This point was reemphasized to the jury shortly thereafter in the charge:

> " * * * In this connection I instruct you that it is not necessary for you to find the defendants performed all of the prohibited acts to which I have referred. If you are convinced beyond a reasonable doubt that they did any one of them, knowing that the narcotic drug referred to in the indictment had been illegally imported and brought into the United States, then you may return a verdict of guilty against the defendant or the defendants on that count, which is the substantive count." (474; A. 18)

Judge Cooper went on to deal with the elements of knowledge of illegal importation and the presumption created by § 174, thusly:

> "*It will doubtless occur to you that the government has not offered any direct evidence to establish that illegal importation* of the substances referred to in the indictment, or of the defendants' knowledge that this substance was imported or brought into the United States contrary to law. I instruct you that if you find the defendants had possession of the heroin, and the evidence in the case does not provide an explanation of the possession by the defendants, or either of them, such possession may be deemed sufficient evidence to authorize conviction." (475; A. 19) (Emphasis supplied.)

When the charge came to treat with the conspiracy count it was made very plain to the jury that the Government had the same burden to show that the subject of the conspiracy was a criminal agreement turning upon narcotics which the defendants knew to have been imported contrary to law, and that the Government's case as to the conspiracy count was similarly deficient in direct proof and that it relied upon the presumption, just as it had under the substantive count:

> "Moreover, before you find either defendant guilty you must find that the government has proved beyond a reasonable doubt not only that he knowingly participated in the conspiracy, but he knew that the conspiracy involved a narcotic drug which had been illegally imported into the United States. *Again you will note that the government has not offered any direct evidence to establish that the defendants knew that the narcotic drugs involved in the conspiracy had been illegally imported into the country. And so*

> *again I instruct you that if you find the defendants had possession of the heroin,* either actual or constructive possession as I have already defined those terms for you, and the evidence in the case does not provide an explanation of the defendant's possession, such possession may be deemed sufficient evidence to authorize conviction." (483-484; A. 27-28) (Emphasis supplied.)

The only possession of narcotics which the Government's proof laid to the defendants was that of the "sample" packet that the Government's witness Cadillac Willie Lowe brought back to Agent Peterson from his car at which Macchiarelli had been a short time before. The defendants' contention, both in their testimony and in summation (441-442) was that they were seeking to buy a quantity of radios (and the Government's witness Lowe had admitted talking to them about selling radios) and that the narcotics produced were Lowe's. During its deliberation the jury asked for the cross examination of Lowe concerning the radios, and the cross examination of the defendants, a rereading of the charge as to reasonable doubt, and the testimony of Agents Cook and Selvaggi about Macchiarelli walking to Lowe's car (517-519). After considering these items and after further deliberation, the jury acquitted the defendants of the substantive count. The conclusion is almost ineluctable that the jury was unwilling to find proof beyond a reasonable doubt based on Lowe's testimony, and that it could not find a sale, concealment, transportation or facilitation or transportation of narcotics. Perforce since that part of the Government's case which rested on Lowe's testimony involved the production and delivery of the sample of narcotics, it could not and did not find a possession, actual or constructive, of narcotics on the part of the defendants or either of them.

Since the period of time and the witnesses as to every aspect of the Government's case as to the conspiracy and substantive counts were the same, and since any possession, constructive or actual, would under the Court's charge have, in the factual context of this case, amounted to proof of the substantive violation, the jury's acquittal negatived the possession vital to invoke the presumption under §174 and show an importation of the narcotics in question and presumptive knowledge thereof, as was indispensably required for the Government's proof as to the conspiracy count.

The petitioners argued in the Court of Appeals in two ways. First they asserted that while juries have wide scope to render verdicts that are not mathematically elegant, on the language and authority of *Dunn* there was a kind of inconsistency which required reversal. The Court of Appeals summarized our contention:

> "The other branch of the argument picks up the immediately succeeding sentences in the *Dunn* opinion:
>
> 'Each count in an indictment is regarded as if it was a separate indictment. Latham v. The Queen, 5 Best & Smith, 635, 642, 643, Selvester v. United States, 170 U.S. 262. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.'
>
> But, says counsel, where separate indictments are separately tried, an acquittal on one *can* be pleaded as *res judicata* of issues necessarily determined, as

> was later held in *Sealfon* in accord with Mr. Justice Holmes' earlier decision in *United States* v. *Oppenheimer*, 242 U.S. 85 (1916). Hence if 'in the counts of a single indictment the same rule must hold,' the acquittal on the substantive count would be conclusive with respect to the conspiracy count and the verdict can be sustained only if we should uphold the Government's argument that there is no fatal inconsistency here, see fn. 4." (Appendix A, *infra*)

Our second position was that if *Dunn* was to be accorded the meaning which the Second and other circuits had given it in face of its plain language, we wish to ask this Court to review and overturn it, a point of view shared by one of the most distinguished sitting Federal Judges. Judge Friendly, speaking for the Court of Appeals, found this project " . . . a task somewhat beyond our powers even if we had the will . . .". (Appendix A, *infra.*)

Reasons for Granting the Writ

(1) In *United States* v. *Vastine*, 363 F. 2d 853 (3rd Cir. 1956), Judge Hastie wrote a concurring opinion which it would seem should have brought Vastine's counsel to this Court seeking further review. So far as we have been able to determine, no petition for certiorari was taken in that case. We set out Judge Hastie's concurrence in its entirety:

> "HASTIE, Circuit Judge (concurring).
>
> At the trial of this indictment the taking of government property was clearly proved and not disputed. On all counts, both those for criminally converting government property to the wrongdoers' use

and the one for conspiracy to commit the substantive offense, the only disputed use was the intent of the accused. Acquittals on the substantive counts were decisions that the disputed criminal intent was lacking. The conviction on the conspiracy count, from which this appeal has been taken, is a decision that the same criminal intent was present.

Recognizing the authority of Dunn v. United States, 1932, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356, I concur in the affirmance of the conspiracy convictions despite their inconsistency with the simultaneous acquittals on the substantive counts. However, in doing so I express my opinion that an enlightened jurisprudence should not thus permit the jailing of accused persons on a record exhibiting verdicts in which a jury simultaneously says 'yes' and 'no' in answer to a single critical question. In these circumstances, a judge of an inferior court can do no more than express his hope that the rule of the *Dunn* case will soon be reconsidered and abandoned." (Id. at 855)

In the instant case the Court of Appeals, taking a traditional view of jury inconsistencies, reaffirmed the justification on the grounds that these inconsistencies afforded a benefit of leniency to the defendant.

"It is true, as both Judge Hand and Mr. Justice Holmes recognized, 7 F. 2d at 60, 284 U.S. at 394, that allowing inconsistent verdicts in criminal trials runs the risk that an occasional conviction may have been the result of compromise. But the advantage of leaving the jury free to exercise its historic power of lenity has been correctly thought to outweigh that danger. See *United States* v. *Maybury, supra,* 274 F. 2d at 902-03." (Appendix A, *infra.*)

The emptiness of this rationale is really evident when one considers the overwhelming practice of giving concurrent sentences on substantive and conspiracy counts; the effect of the rule is simply to encourage prosecutors to plead with such prolixity that the jury may well "compromise" by "giving" the Government just one count. In this case the invocation of the leniency rationale by the Court of Appeals verges on the sardonic. The statute under which the defendants were convicted carries with it a Draconian mandatory minimum of five years imprisonment. The charge of being a narcotics trafficker is hardly one to evoke a jury's sympathy. Why, as the defenders of the rule assume, is it a jury with a guilty man to whom they wish to extend lenity that brings in an inconsistent verdict? Why is it not fully as reasonable to assume that an inconsistent verdict represents a judgment by a jury unconvinced of the defendant's guilt on the evidence but carried by some of its members to the conclusion that the defendant should not go unwhipped of justice? It is all very well to speak as the Court of Appeals did here of the risk of compromises, but if those compromises are compromise convictions of men thought by the jury to be in fact innocent, then they represent a departure from the standards of civilized jurisprudence. We respectfully submit that this Court in *Jackson* v. *Denno,* 378 U.S. 368 (1964) administered the *coup de grace* to the treatment of jury conduct in terms of abstract metaphysical niceties and formalistic doctrines in the area of the admissibility of confessions. We respectfully urge that the time is now ripe for a reconsideration of the question of inconsistent verdicts in criminal cases.

(2) While *Dunn* is undoubtedly generally thought to sustain any sort of inconsistency in jury verdicts, we respectfully submit that this meaning is in defiance of the plain language of Mr. Justice Holmes' opinion, and that correctly read in the light of *Sealfon* v. *United States*, 332 U.S. 575 (1948), *Dunn* sets up the rule that before the inconsistencies rise to the point of requiring reversal, they must be so gross as to be of a sort which would have given rise to a successful plea in bar if the counts were tried successively in separate trials rather than together in a joint trial. That is what the words of the opinion say. The explanation proffered by the Court of Appeals for the appearance of the language we quoted from *Dunn* took the form of a venture in speculative medico-geriatric biography. Thus:

> "The contention has the difficulty that, as was intimated in *United States* v. *Maybury*, 274 F. 2d 899, 905 (2 Cir. 1960), it would necessarily have led Mr. Justice Holmes into a position precisely the opposite of what he took in *Dunn*. The escape from the dilemma lies in owning that in this, his last opinion, written in his ninety-first year,[6] the Justice was mistaken in identifying the two situations, but that the argument was in no way essential to his conclusion.

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[6] *Dunn* was decided on January 11, 1932; Holmes' letter of resignation was sent the following day, 284 U. S. vii. A letter of January 3, 1932, attests that the opinion was written at a time of failing powers:

> 'I have not been very well and I find it difficult to write; difficult physically and mentally. I hope to get back to normal but at present life is hard. We begin our sittings again on Monday. I have but one opinion to deliver, another being held up for tinkering to meet a long dissent from Butler—agreed to by no one else I believe.' The Holmes-Einstein Letters 335 (1964).

The latter opinion was quite obviously *Dunn;* one wonders whether the sentences we have just examined constituted the 'tinkering.'" (Appendix A, *infra.*)

This is dubious biography. Mr. Justice Frankfurter in his biographical note, 21 Dictionary of American Biography, 417 (Supplement One, 1944, "Oliver Wendell Holmes, Jr."), speaking of the retirement years after the great man had left the Court, wrote:

> "* * * He had become a very old man but his faculties were never impaired."

In any event, the plain language of an opinion, especially one by so distinguished a jurist, cannot be set at nought by extrinsic medical evidence of the ravages of age without encouraging the bar to pursue lines of research best left unexplored. When counsel argues before a judge of the United States and looks into that judge's eyes, he should be looking for the clear light of justice and not hoping to detect the presence of an *arcus senilis*.

We respectfully submit that there is ample reason for this Court to review the question of inconsistent verdicts in Federal criminal cases. We think Judge Hastie's words by themselves are enough to suggest to this Court that the permissiveness of the present rule in regard to inconsistent verdicts has given rise to a breeding ground for injustice.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
ROBERT KASANOF
Attorneys for Petitioners Carbone and Macchiarelli